

)	
L.B., Appellant)	
)	
and)	Docket No. 12-1424
)	Issued: November 16, 2012
U.S. POSTAL SERVICE, POST OFFICE,)	
Santa Clarita, CA, Employer)	
)	

Case Submitted on the Record

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

On June 15, 2012 appellant filed a timely appeal from a December 20, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days have elapsed from the issuance of the underlying merit decision dated July 6, 2011, to the filing of the current appeal on June 15, 2012, the Board has no jurisdiction over the merits of the case.² Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

³ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 15, 2011 OWCP accepted that appellant, then a 40-year-old letter carrier, sustained an L5-S1 herniated nucleus pulposus due to factors of his federal employment.

On June 25, 2009 appellant filed a claim for a schedule award.

By decision dated July 6, 2011, OWCP granted appellant a schedule award for four percent permanent impairment of the left lower extremity.

On August 4, 2011 appellant requested an oral hearing before an OWCP hearing representative.

In an August 23, 2011 letter, OWCP noted receiving appellant's hearing request, but advised that, if the case was in posture for a hearing, it would appear on the hearing docket within six to eight months. It advised that appellant would receive at least 30 days advanced notice of the hearing which would advise him of the date, time and location of the hearing.

In an October 4, 2011 notice, the Branch of Hearings and Review informed appellant that his hearing was scheduled on November 14, 2011 at 11:00 a.m. local time.⁴ It provided him with the address of the hearing location and the notice was mailed to his address of record. OWCP advised appellant that postponement of the hearing would only be permitted upon receipt of documentation showing his nonelective hospitalization or that the death of a spouse, parent or child prevented his attendance. The notice was mailed to his address of record. Appellant did not appear at the scheduled hearing.

In a December 8, 2011 telephone call memorandum, appellant contacted OWCP to learn when his hearing would be held. When informed that a hearing notice had been sent and that he had not appeared at the scheduled hearing, he indicated that he did not receive a hearing notice. OWCP explained that appellant was presumed to have received the hearing notice. Appellant asserted that someone may have tampered with his mail.

By decision dated December 20, 2011, OWCP found that appellant abandoned his requested hearing. The decision noted that the hearing was scheduled for November 14, 2011, but he failed to appear as instructed. The decision also found that there was no indication that appellant contacted OWCP prior or subsequent to the scheduled hearing to explain his failure to participate. OWCP also noted that he contacted OWCP via telephone on December 8, 2011 and informed OWCP that he did not receive a hearing notice. It explained that appellant was presumed to have received the hearing notice under the mailbox rule and it would not schedule another hearing.

⁴ OWCP stated that the hearing would be conducted via video teleconference. No telephone or pass code was provided. The notice otherwise advised appellant of the time and physical location where the hearing was to be held and directed that appellant or his representative be present.

LEGAL PRECEDENT

Under FECA and its implementing regulations, a claimant who has received a final adverse decision by OWCP is entitled to receive a hearing upon writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.⁵ Unless otherwise directed in writing by the claims examiner, OWCP's hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.⁶ OWCP has the burden of proving that it mailed notice of a scheduled hearing to a claimant.⁷

Section 10.622(f) of OWCP's regulations provide that a claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled.⁸ Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference. The failure of the claimant to request another hearing within 10 days, or the failure to appear at the second scheduled hearing, review of the matter will proceed as a review of the written record. Where it has been determined that a claimant has abandoned his or her right to a hearing, OWCP will issue a formal decision finding that the claimant has abandoned his or her request for a hearing.⁹

ANALYSIS

The Board finds that OWCP properly determined that appellant abandoned his request for a hearing.

By decision dated July 6, 2011, OWCP issued a schedule award granting appellant a four percent left lower extremity impairment. Appellant timely requested a hearing. In an October 4, 2011 letter, OWCP notified him of the time and location for the November 14, 2011 scheduled hearing. The hearing notice was properly mailed to appellant's address of record more than 30 days prior to the scheduled hearing date. In the absence of evidence to the contrary, a letter properly addressed and mailed in the course of due business is presumed to have arrived at the mailing address in due course if not returned. This is known as the mailbox rule.¹⁰ Appellant did not appear at the appointed time. He also did not request a postponement of the hearing or explain his failure to appear at the hearing within 10 days of the scheduled hearing date of November 14, 2011. The Board, therefore, finds that appellant abandoned his request for a hearing.

⁵ 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

⁶ 20 C.F.R. § 10.617(b).

⁷ See *Michelle R. Littlejohn*, 42 ECAB 463 (1991); see also *M.B.*, Docket No. 10-1077 (issued March 17, 2011).

⁸ 20 C.F.R. § 10.622(f).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(g) (October 2011).

¹⁰ See, e.g., *Kenneth E. Harris*, 54 ECAB 502 (2003).

On appeal, appellant contends that he received a letter from OWCP on August 23, 2011 regarding his request for a hearing. He noted that he was advised that he would receive a notice regarding whether a hearing was scheduled within six to eight months; however, he contends that he never received the notice. Appellant indicated that he had no reason to expect a hearing prior to February through April 2012 and thus did not realize that he missed the hearing until he contacted OWCP on December 8, 2011. The August 23, 2011 OWCP letter did not purport to indicate that it would be at least six to eight months before a hearing was held. Instead, it generally indicated that a hearing would be scheduled within six to eight months and that he would receive at least 30 days' notice of the scheduled hearing. As noted above, proper notice of the hearing was sent to appellant on October 4, 2011 and, under the mailbox rule, the notice was presumed to have arrived in due course.

CONCLUSION

The Board finds that OWCP properly determined that appellant abandoned his request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 16, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board